Tunku Moksin bin Tunku Khalid v Bukit Barisan Sdn Bhd & Ors

HIGH COURT (SHAH ALAM) — PETITION NO MT1–1–26–6 OF 2007
NORAINI ABDUL RAHMAN JC
28 MAY 2009

Legal Profession — Conflict of interest — Professional conduct — Solicitor presided as chairman of company's EGM — Whether there was personal relationship — Whether conduct contravened r 3 of the Legal Profession (Practice and Etiquette) Rules 1978 — Whether his legal firm should be barred from representing respondent company

The petitioner applied for an injunction ('encl 3') to stop the respondents from disposing its immovable and movable asset. The injunction was also to stop the respondents from transacting with Khidmat Sentiasa Sdn Bhd and Marvellous Century Sdn Bhd in respect to the sale of the first respondent's assets. However the petitioner's counsel raised preliminary issues to be adjudicated by the court before hearing the petitioner's submissions in encl 3. The petitioner argued that the firm representing the first, second and seventh respondents was placed in a position of conflict of interest. The petitioner submitted that the third respondent had given the managing director of the respondents' solicitors ('the solicitor'), a proxy to vote in an extraordinary general meeting ('EGM'). The solicitor presided in an EGM which was held to pass resolution on the sale of the first respondent's assets, and giving authority to Khidmat Sentiasa Sdn Bhd by passing of an ordinary resolution to, inter alia, authorise any one director to sign and execute all relevant documents on behalf of the company. The petitioner averred that by virtue of the appointment of the solicitor as chairman of the company to preside in the EGM, he and his legal firm should be barred from representing the first, second and seventh respondents. The petitioner further argued that the solicitor presiding as chairman would give him unlimited access to all information pertaining to the crucial resolution at the EGM meeting. Hence, the solicitor by presiding in the EGM had contravened r 3 of the Legal Profession (Practice and Etiquette) Rules 1978 ('Rules'). The petitioner relied on *RS Muthiah v Pembinaan Fiba Sdn Bhd* [2004] 4 MLJ 78 and *Paruvathy a/p Palany v Sathiasealan a/l Govindasamy* [1999] 5 MLJ 151. The respondent distinguished the cases by submitting that both the cases were related in respect to the personal relationships between counsel involved and the party in the proceedings.

Held, allowing the preliminary objection.

Personal relationship existed between the solicitor and the third respondent. The solicitor would be caught under r 3 of the Rules. The solicitor and his law firm and his partners and his legal assistants should be barred from representing the respondents or any one or more of them (see paras 14–15).

[Bahasa Malaysia summary

Pempetisyen memohon satu injunksi ('lampiran 3') untuk menghalang responden-responden daripada melupuskan aset tak alih dan aset mudah alih mereka. Injunksi tersebut juga adalah untuk menghalang responden-responden daripada berurusan dengan Khidmat Sentiasa Sdn Bhd dan Marvellous Century Sdn Bhd berkenaan dengan penjualan aset-aset responden pertama. Walau bagaimanapun peguam pempetisyen menimbulkan isu-isu awalan untuk diputuskan oleh mahkamah sebelum mendengar penghujahan pempetisyen dalam lampiran 3. Pempetisyen menghujahkan bahawa firma yang mewakili responden-responden pertama, kedua dan ketujuh berada dalam satu kedudukan yang mempunyai konflik kepentingan. Pempetisyen menghujah bahawa responden ketiga telah memberikan kepada pengarah urusan peguam cara responden-responden ('peguam cara'), suatu proksi untuk mengundi dalam mesyuarat agung luar biasa ('EGM'). Peguam cara tersebut mempengerusikan EGM yang telah diadakan untuk meluluskan resolusi ke atas penjualan aset-aset responden pertama, dan memberi kuasa kepada Khidmat Sentiasa Sdn Bhd dengan meluluskan satu resolusi biasa, antara lain, untuk membenarkan mana-mana pengarah menandatangani dan melaksanakan semua dokumen-dokumen yang berkaitan bagi pihak syarikat. Pempetisyen menegaskan bahawa dengan pelantikan peguam cara sebagai pengerusi syarikat untuk mempengerusikan EGM, dia dan firma guamannya seharusnya dihalang daripada mewakili responden-responden pertama, kedua dan ketujuh. Pempetisyen selanjutnya menghujahkan bahawa peguamcara tersebut dengan kedudukannya sebagai pengerusi akan memberi beliau akses yang tidak terhad kepada semua maklumat berkenaan dengan resolusi penting pada mesyuarat EGM tersebut. Oleh itu, peguam cara tersebut dengan mempengerusikan EGM telah melanggar k 3 Kaedah-Kaedah Profesion Undang-Undang (Amalan dan Kesopanan) 1978 ('Kaedah-Kaedah'). Pempetisyen bergantung pada kes *RS Muthiah v Pembinaan Fiba Sdn Bhd* [2004] 4 MLJ 78 dan *Paruvathy a/p Palany v Sathiasealan a/l Govindasamy* [1999] 5 MLJ 151. Responden membezakan kes-kes itu dengan menghujahkan bahawa kedua-dua kes-kes itu adalah berkaitan dengan hubungan peribadi antara peguam terlibat dan pihak dalam prosiding tersebut.

Diputuskan, membenarkan bantahan awalan:

Hubungan peribadi wujud antara peguam cara dan responden ketiga. Peguam cara tertakluk kepada k 3 Kaedah-Kaedah. Peguam cara dan firma guamannya dan rakan-rakan kongsinya dan pembantu-pembantu undang-undangnya sepatutnya dihalang daripada mewakili responden-responden tersebut atau mana-mana satu atau lebih daripada mereka (lihat perenggan 14–15).]

Notes

For a case on professional conduct, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1573.

Cases referred to

Paruvathy a/p Palany v Sathiaseelan a/l Govindasamy [1999] 5 MLJ 151, HC (folld)

RS Muthiah v Pembinaan Fiba Sdn Bhd [2004] 4 MLJ 78; [2004] 2 CLJ 917, HC (folld)

Legislation referred to

Legal Profession (Practice and Etiquette) Rules 1978 rr 3, 3(b)(ii), 28(a)

Shamesh (Shariffullah with him) (Jeevaretnam) for the petitioner.

SK Lam (Manjit Singh Sachdev, Mohammad Radzi & Partners) for the respondents.

Noraini Abdul Rahman JC:

[1] This is an application by the petitioner (encl 3) to injunct the respondents from disposing it's movable and immovable asset. Further it is to injunct the respondents from transacting with two companies namely Khidmat Sentiasa Sdn Bhd and/or Marvellous Century Sdn Bhd regarding the sale of the first respondent's assets.

[2] At the start of the proceeding petitioner's counsel raised a preliminary issue for the court to adjudicate before hearing submissions on encl 3.

[3] The issue is:

Is the firm of solicitors representing the first, second and seventh respondents placed in a position of conflict of interest because the managing director of the legal firm, Dato' Manjit Singh (who had the proxy of Mr All Loi Yu @ Kuah Hock Yew (the third respondent) presided at the crucial EGM held on 27 February 2007.

[4] Counsel for the petitioner submitted that by presiding as chairman and also further given mandate by proxy of the third respondent to vote, Dato' Manjit Singh will be highly likely be called as witness by either party in the suit. Counsel referred to the following cases.

(a) *RS Muthiah v Pembinaan Fiba Sdn Bhd* [2004] 4 MLJ 78; [2004] 2 CLJ 917 where it was held where a solicitor is pecuniarily interested, the rule of prudence and good sense dictates that he should not accept the brief.

(b) *Paruvathy a/p Palany v Sathiaseelan a/l Govindasamy* [1999] 5 MLJ 151 where the court held 'there was a possibility that Mr T Rajagopalu might be cross-examined on his affidavit … Mr Rajagopalu may end up as a witness and he would be caught under r 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978. … Therefore, his law firm and his partners and legal assistants should be barred from representing the defendants'.

[5] Counsel also submitted that r 3(b)(ii) of the Legal Profession (Practice and Etiquette) Rules 1978, an advocate and solicitor shall not accept a brief if he is or would be embarrassed.

[6] Counsel referred to the affidavit in support deposed by the petitioner where he had exhibited the article of association of the first respondent as regards the appointment of chairman. He submitted that since Dato' Manjit Singh was elected as chairman of that controversial meeting, then he or his legal firm should be barred from representing the first, second and seventh respondents. This is especially so because he hold the proxy of third respondent to vote. Also by presiding as chairman he had unlimited access to all information pertaining to the crucial resolution at that meeting.

[7] Counsel for the respondents distinguished the cases cited earlier by counsel for petitioner ie the case of *RS Muthiah and Paruvathy*.

[8] He submitted that in *RS Muthiah*'s case, the application was by way of summons in chambers. In *Paruvathy*'s case, the plaintiff applied by way of originating summons.

[9] He also submitted that in the cases submitted there is a common thread in that there was personal relationships between counsel involved and the party in the proceedings.

[10] After having heard the submissions of both counsel and after having read the relevant documents and cases referred, I have come to the following conclusions:

(a) It is an undisputed fact that Dato' Manjit was elected to preside at the crucial EGM where the resolution thereof had become the subject matter of this civil suit.

(b) It is an undisputed fact that Dato' Manjit Singh hold the proxy of the third respondent in this suit. The third respondent hold 50,000 shares or 0.5%.

(c) It is an undisputed fact that he is the managing director of the firm Manjit Singh Sachdev, Mohamad Radzi and Partners (the said firm).

(d) It is an undisputed fact that the said legal firm is representing the first, second and seventh respondents.

[11] I now turn on to the notice of the EGM and resolution passed at the EGM held on 27 February 2007 which in the words of counsel for the first, second and seventh respondents, was a 'hotly contested meeting'.

[12] In the notice of the EGM, it was to pass the following resolution:

(1) That the transfer of the building re: One unit factory with three storey office building constructed on land held under HS (M) 17020 No PT 2608 Mukim Petaling Daerah Petaling, Negeri Selangor belonging to Khidmat Sentiasa Sdn Bhd for cash consideration of the sum of RM4,518,636 (Malaysian Ringgit four million five hundred and eighteen thousand six hundred and thirty six) only and on terms and conditions as stipulated in the agreement be approved.

(2) That authority be and is hereby given to Khidmat Sentiasa Sdn Bhd (company's wholly owned subsidiary) to pass the following ordinary resolutions:

   (a) That the company do sell property re: leasehold title for 99 years held under HS (M) 17020 No PT 2608 Mukim Petaling, Negeri Selangor together with one unit factory with a three storey office building to Marvellous Century Sdn Bhd for a cash consideration of RM9,000,000 (Malaysian Ringgit nine million) only and on terms and conditions as stipulated in the agreement.

   (b) That authority be and is hereby given to any one director to sign the agreement and all relevant documents to be executed in connection therewith on behalf of the company.

   (c) That authority be and is hereby given for the affixation of the

company's seal to the relevant documents to be executed in connection therewith in accordance with the provisions of the company's articles of association.

BY ORDER OF THE BOARD

[13] It was against this resolution that the petitioner is seeking to injunct all the respondents. I am of the view that since Dato' Manjit Singh, who held a proxy and who was also voted to preside over the crucial and hotly contested EGM, it is very likely that he would be called to testify at the proceedings. So, following the decisions in cases cited before me, where even though there is no personal relationship in the nature as described in the case of *RS Muthiah v Pembinaan Fiba Sdn Bhd* (where the wife of managing director of the defendant company act as solicitor for the defendant company) or in *Paruvathy a/p Palany v Sathiaseelan a/l Govindasamy* where Abdul Malik Ishak J (as he then was) held:

> It was clear that Mr T Rajagopalu was personally involved in the whole episode. There was a possibility that Mr T Rajagopalu might be cross-examined on his affidavit … Further the court had a discretion to allow a party to cross-examine a deponent. Mr T Rajagopalu may end up as a witness for the defendant and he would be caught under r 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978. When he affirmed the affidavit, he was no longer acting as counsel for the defendant but as witness. Therefore, his law firm and his partners and legal assistants should be barred from representing the defendant.

[14] I am of the opinion that there is a personal relationship between Dato' Manjit Singh and the third respondent. Because of this relationship, Dato' Manjit Singh was given the proxy to vote. It is not an ordinary relationship at all. This is a proxy to vote at a hotly contested EGM and so, the person given the proxy must be someone the third respondent personally trust.

[15] Having found that there is a personal relationship between Dato' Manjit Singh and the third respondent, Dato' Manjit Singh would be caught under r 3 of the Legal Profession (Practice and Etiquette) Rules 1978 which provides:

(a) An advocate and solicitor shall not accept a brief if he is or would be embarrassed.

(b) An embarrassment arise —

(i) where the advocate and solicitor finds he is in possession of confidential information as a result of having previously advised another person in regard to the same matter;

(ii) where there is some personal relationship between him and a party or a witness in the proceedings.

[16] Therefore, his law firm and his partners and his legal assistants should be barred from representing the respondents or any one or more of them.

[17] I therefore allow the preliminary objection raised by counsel for the petitioner.

Preliminary objection allowed.

Reported by Mashrifah Ravendran